

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

QUINCEY ROBINSON, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

AVANQUEST NORTH AMERICA INC., a
California corporation, and AVANQUEST
SOFTWARE S.A., a French company,

Defendants.

Case No. 14-cv-08015

**AFFIDAVIT OF KEVIN BROMBER IN OPPOSITION TO QUINCEY ROBINSON'S
MOTION TO REMAND LAWSUIT TO STATE COURT**

I, Kevin Bromber, residing at 4149 Greenbrier Lane, Tarzana, CA 91356, do hereby
solemnly affirm and declare as follows:

1. For the last 4 years I have been the Executive Vice President of Avanquest North America, Inc. ("Avanquest") and since April 2012 I have been the General Manager of the product at issue in this lawsuit – Fix-It Utilities Professional ("Fix-It"), including specifically Fix-It Utilities 14 Professional, also known as Fix-It Utilities Professional, Version 14. In those capacities, I am in charge of Avanquest's day-to-day operations regarding Fix-It, including the general functionality and use of Fix-It, the marketing and advertising of Fix-It and the overall operations and sales of Fix-It. I also believe that I have the most knowledge of anyone at Avanquest regarding the history of Fix-It. If called as a witness, I would competently testify to the facts in this affidavit, all of which are within my own personal knowledge, except for those matters stated on information and belief, and as to those matters I believe them to be true.

2. I live in the County of Los Angeles, and work at Avanquest's headquarters in Calabasas, California. I have worked at Avanquest's Calabasas headquarters since November 2008.

3. Based on my work as General Manager of Avanquest's Fix-It product, I know that the Fix-It software program is sold nationally. Fix-It is sold in pre-packaged boxes at big box retail stores, such as Wal-Mart, Best Buy, Target, *etc.*, and local office supply stores. In addition to retail brick and mortar sales, Fix-It is sold nationally online through Avanquest.com and other online retailers. Avanquest creates one package of Fix-It for its retail distributors and ships the product from its warehouse in Riverside, California to those distributors for their nationwide distribution. Certain large retailers have different packaging based on each retailer's different requirements. In those circumstances, Fix-It is produced and packaged to those retailer's standards for nationwide distribution and not on a state-by-state basis.

4. As General Manager of Avanquest's Fix-It software program, I know that when Fix-It is purchased in a retail store it comes in a box which contains three items: (1) the Fix-It Utilities User's Guide ("User's Guide"); (2) a single disk labeled Fix-It Utilities Professional Bootable Rescue Disk ("Fix-It Disk"); and (3) a Fix-It Utilities Pro registration card. In addition to the paper copy of the User's Guide, the User's Guide is available electronically on the Fix-It Disk. Fix-It comes with an unconditional 90-day money back guarantee.

5. Both the paper copy and the electronic copy (on the Fix-It Disk) of the User's Guide for Fix-It Utilities 14 Professional contain Avanquest's End User License Agreement ("EULA"), which starts on the third page of the User's Guide (counting the cover page) and ends on the seventeenth page of the User's Guide. The EULA clearly states: "The software that is subject to this End User's License Agreement (EULA) is licensed, not sold, to you ("you,"

"your" or "Licensee") by VCOM, a division of Avanquest North America Inc. d/b/a V Communications ("VCOM")."

6. In order to install and run Fix-It on a computer, the user must insert the Fix-It Disk into his or her computer. When a user does so, the first screen that appears displays a dialogue box of the Fix-It set-up wizard. Attached hereto as **Exhibit 1(a)** is a true and correct copy of a screen shot of a monitor connected to a computer that had the Fix-It Disk inserted in the computer and displays the above-referenced Fix-It set-up wizard dialogue box. When the user clicks the "Next" button, a dialogue box displaying Avanquest's EULA appears, and prompts the user to review the entire EULA and click "Accept" and assent to the terms of the EULA. The "Accept" button appears below a window containing the entire EULA. Attached hereto as **Exhibit 1(b)** is a true and correct copy of a screen shot of a monitor connected to a computer that had the Fix-It Disk inserted in the computer and displays the above-referenced EULA dialogue box. The user cannot start the installation process unless he or she first agrees to the terms of the EULA by clicking the "Accept" button, after which a dialogue box appears requesting the user enter the Fix-It serial number. Attached hereto as **Exhibit 1(c)** is a true and correct copy of a screen shot of a monitor connected to a computer that had the Fix-It Disk inserted in the computer and displays the above-referenced serial number request dialogue box. In order to run Fix-It, it must be installed on a user's computer. Accordingly, if someone such as plaintiff Quincey Robinson ("Robinson") used Fix-It, he or she must have first accepted Avanquest's EULA (containing the forum selection clause, choice of law clause, and arbitration provision) before Fix-It could have been installed on his or her computer and be available for use.

7. On the twelfth page of the EULA there is a section entitled "GOVERNING LAW,

VENUE AND JURISDICTION,” which contains choice of law and forum selection clauses calling for the application of California law in a California forum to disputes regarding the EULA and Fix-It. Specifically, that section states the following:

This EULA is subject to, and will be governed by and construed in accordance with the substantive laws in force of the State of California. Except as provided in the “Dispute Resolution and Arbitration” Provision, any action arising under, relating to or connected with this EULA or the use of the Licensed Software will be filed only in an appropriate court located in Los Angeles County, California, and the parties irrevocably consent and submit to the exclusive personal jurisdiction of such courts for such purposes. This EULA will not be governed by the conflict of law rules of any jurisdiction, or the United Nations Convention on Contracts for the International Sale of Goods, the application of which is expressly excluded.

8. Beginning on the fifth page of the EULA there is a section entitled “DISPUTE RESOLUTION AND ARBITRATION,” that continues for four pages to the eight page of the EULA, containing an arbitration provision with class action waiver that mandates individual arbitration of any disputes that may arise between a purchaser and Avanquest. Specifically, that section states the following:

This provision facilitates the prompt and efficient resolution of any Disputes that may arise between you and VCOM. Arbitration is a form of private dispute resolution in which persons with a dispute waive their rights to file a lawsuit, to proceed in court and to a jury trial, and instead submit their disputes to a neutral third person (or arbitrator) for a binding decision. You have the right to opt-out of this Provision (as explained below), which means you would retain your right to litigation your Disputes in a court, either before a judge or jury.

Please read this Provision carefully. It provides that all disputes between you and VCOM (as defined below, for this Provision) shall be resolve by binding arbitration. Arbitration replaces the right to go to court. In the absence of this arbitration agreement, you may otherwise have a right or opportunity to bring claims in court, before a judge or jury, and/or participate in or be represented in a case filed in courts by others (including, but not limited to, class actions). Except as otherwise provided, entering into this

agreement constitutes a waiver of your right to litigate claims and all opportunity to be heard by a judge or jury. There is no judge or jury in arbitration, and court review of an arbitration award is limited. The arbitrator must follow this agreement and can award the same damages and relief as a court (including attorneys' fees).

... WE EACH AGREE THAT, EXCEPT AS PROVIDED BELOW, ANY AND ALL DISPUTES, AS DEFINED ABOVE, WHETHER PRESENTLY IN EXISTENCE OR BASED ON ACTS OR OMISSIONS IN THE PAST OR IN THE FUTURE, WILL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION RATHER THAN IN COURT IN ACCORDANCE WITH THIS PROVISION.

Pre-Arbitration Claim Resolution. For all disputes, whether pursued in court or arbitration, you must first give VCOM an opportunity to resolve the Dispute. You must commence this process by mailing written notification to VCOM, Legal Department, 23801 Calabasas Road, Calabasas, California 91302. That written notification must include (1) your name, (2) your address, (3) a written description of your Dispute, and (4) a description of the specific relief you seek. If VCOM does not resolve the Dispute within 45 days after it receives your written notification, you may pursue your Dispute in arbitration. You may pursue your Dispute in a court only under the circumstances described below.

Exclusions from Arbitration/Right to Opt Out. Notwithstanding the above, you or VCOM may choose to pursue a Dispute in court and not by arbitration if ... YOU OPT-OUT OF THESE ARBITRATION PROCEDURES WITHIN 30-DAYS FROM THE DATE THAT YOU FIRST CONSENT TO THIS AGREEMENT (the "Opt-Out Deadline"). ...

Class Action Waiver. Except as otherwise provided in this Provision, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a class or representative proceeding or claims (such as class action, consolidated action or private attorney general action) unless both you and VCOM specifically agree to do so following initiation of arbitration. If you choose to pursue your Dispute in court by opting out of this Provision, as specified above, this Class Action Waiver will not apply to you. Neither you, nor any other user of the Licensed Software can be a class representative, class member, or otherwise participate in a class, consolidated, or representative proceeding without having complied with the opt-out requirements above.

9. As General Manager for Fix-It and the person in charge of Avanquest's day-to-day operations regarding Fix-It I have verified that Avanquest has not received from Robinson any written notification electing to opt out of the arbitration clause of the EULA nor the written notification required by the Pre-Arbitration Claim Resolution clause of the EULA.

10. I have reviewed Robinson's complaint, including his "Prayer for Relief" that requests injunctive relief. After considering the injunctive relief requested, Avanquest has determined that complying with Robinson's demands will require Avanquest to modify Fix-It's software source code and packaging and Avanquest's website. Avanquest would have to make the requested changes on a systemic basis and could not merely make those changes for Robinson alone, or for Fix-It sold within the State of Illinois. The existing stock of the current version of Fix-It in the stores and distribution centers for all of its retailers across the USA is known as "In Channel Inventory." Because Fix-It is sold on the Fix-It Disk in a package, any changes to Fix-It's source code and packaging would require Avanquest to recall and replace its existing In Channel Inventory and thereafter replace it with a new version of the product containing the requested changes. Presently, the cost incurred by Avanquest to produce its current In Channel Inventory is \$127,978.19. That In Channel Inventory would need to be recalled and replaced with new product at a minimum cost of \$127,978.19. This amount does not include any costs associated with making the requested changes to Avanquest's website or the source code for Fix-It. Further, based on current shipping agreements, it would cost Avanquest \$8,700.12 to re-ship the same number of In Channel Inventory Fix-It units conforming to Robinson's injunctive relief demands to its distributors. In addition to In Channel Inventory, Avanquest has finished packaged units of Fix-It in its warehouse that cost Avanquest

\$25,963 to produce. Those finished packaged units would also have to be replaced with new conforming units of Fix-It.

11. The current version of Fix-It on the market is version 15. Fix-It Version 15 was released in late fall of 2013 and all Fix-It Version 14 inventory was depleted by February 17, 2014. When a new version of Fix-It is released, the In Channel Inventory for the prior version is depleted and replaced with the newly released version and the prior version is no longer produced. Thus, any injunctive relief demands for changes to Fix-It would have to be implemented in Fix-It Version 15.

12. I have reviewed all of the sales figures for Fix-It for the time period of September 15, 2010, through September 15, 2014. The national sales for Fix-It for September 2010 to September 2014 totals 470,273 units.

13. Attached hereto as **Exhibit 2** is a true and correct copy of the Avanquest End User License Agreement for Fix-It Utilities 14 Professional (also known as Fix-It Utilities Professional, Version 14).

Dated: November²⁴, 2014


KEVIN BROMBER

* See attached Exhibit

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

On November 24, 2014 before me, Ravinder Bhalla, Notary Public, Notary Public, personally appeared Kevin Bromber, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: 

(seal)



CERTIFICATE OF SERVICE

I, Natalie M. Limber, an attorney, hereby certify that on November 24, 2014, I caused a true and correct copy of this Affidavit of Kevin Bromber in Opposition to Quincy Robinson's Motion to Remand Lawsuit to State Court to be electronically filed with the Court using the CM/ECF system, and the following counsel of records were served:

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/s/ Natalie M. Limber
One of the Attorneys for Avanquest
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